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DISCUSSION KICK-OFF

# A Critique of Proportionality Balancing as a Harmonization Technique in International Law

SUÉ GONZÁLEZ HAUCK — 5 August, 2015 Print 1

Since the publication of the Fragmentation Report by the International Law Commission, international legal scholars and practitioners alike seem to be less concerned about the theoretical questions raised by the fragmentation debate. Instead, they have turned to identifying and examining tools which could avoid or resolve normative conflicts between norms of different specialized areas of international law (also

referred to as "regimes"). Proportionality balancing is one of these tools of harmonization. I argue, however, that the understanding of proportionality analysis that is currently employed in practice and encouraged by scholars deformalizes legal discourse and leads to intransparency. I also argue that it perpetuates structural bias and shifts the burden of justification to the detriment of human rights norms.

**Proportionality balancing as currently understood**

It has been employed by international judicial and quasi-judicial bodies. One example is the Appellate Body of the World Trade Organization (WTO) and its handling of the Korea Beef case. Other examples can be found in the awards issued by some investor-state arbitral tribunals, most prominently in the Tecmed case. Many legal scholars have praised and encouraged the employment of proportionality balancing as a tool for harmonizing international law (*inter alios*, Anne van Aaken, Stephan Schill, Alec Stone Sweet, and in a more differentiated way Thomas Kleinlein). This positive response is hardly surprising, given that proportionality balancing promises to reconcile formalism with flexibility, rational legal thinking with individual fairness, and analytical methodology with context-sensitivity.

The notion of proportionality balancing that scholars and practitioners have advocated as a strategy in response to fragmentation rests on the legal theories of Ronald Dworkin and Robert Alexy. Dworkin establishes two categories of legal norms: rules and principles. Alexy builds on this distinction and argues that the mechanisms employed to resolve normative conflicts differ according to the category into which the conflicting norms fall. Conflicts of rules are

resolved by determining which rule takes precedence. This overriding rule will then act as an exception to the rule that is set aside due to the conflict. Conflicts of principles, however, cannot be resolved in the same way. Alexy thus states that principles must be regarded as optimization requirements. Therefore, in case of a conflict, the court must find a solution that realizes both principles to the fullest extent. Proportionality balancing is conceived by Alexy as a means of achieving such an optimal solution.

**Deformalization of legal discourse**

If proportionality balancing is encouraged as a way of responding to fragmentation, international courts and tribunals are also encouraged to formulate normative conflicts as conflicts of principles rather than conflicts of rules. This leads to a disregard of the specific legal rules and to a search for the principles – or "interests" – which supposedly can be found *behind* the rules. Legal rules, however, are drawn up as such for a reason. They are meant to incorporate a more specific understanding of the way in which a value, interest, or principle may apply to a certain context. They are supposed to interact with each other as a system of substantive rules as well as procedural rules dealing, *inter alia*, with who may decide over the specific meaning of a rule in a given case. Behind these expectations towards the legal form lies the promise of transparency, predictability, and equality before the law. Prominent participants in the early phase of the fragmentation debate, including Gerhard Hafner, Stephen Schwebel, and Gilbert Guillaume, have voiced their deep concern that the fragmentation of international law may endanger the predictability of international law. It is, to say the least, paradoxical, that proportionality balancing – an instrument

prone to leaving aside the legal form altogether – is presented as an adequate response to the phenomenon of fragmentation.

**Intransparency**

The second shortcoming of proportionality balancing as a tool of harmonization is that one of the main sites of disagreement in international legal discourse is not represented in its argumentative framework: the content of the principles which are being weighed against each other. Balancing can only take place after a common understanding of the conflicting principles has been established. The more international courts and tribunals rely on proportionality balancing as a supposedly rational form of dealing with cross-regime normative conflict, the more they may tend to overemphasize the act of balancing and de-emphasize questions regarding the content of the principles in question. The problem is aggravated when Alexy's understanding of normative conflicts as optimization problems is combined with an approach to international law based on an economic analysis of the law. Such an approach negates the controversial nature of its basic assumptions and claims objectivity. Thus, any alternative understanding of the conflicting principles will have to challenge this particular form of rationality before being able to engage in a discussion about substance. Contestation of international judicial decisions is thus made significantly more difficult.

**Perpetuating structural bias**

Proportionality balancing, if it is understood as an 'objective' exercise of optimization, leads to the perpetuation of any structural bias inherent in a given regime of international

law. This, again, is due to the blindness of the economic theory of international law to the contingency and controversial nature of its basic premises. However, proportionality balancing does not only tend to depoliticize legal discourse when it is employed based in connection with such an economic theory. It was Alexy's explicit intention, when he proposed his understanding of the proportionality principle, to find a way in which legal decision-making could escape political struggle (Alexy, Theorie der Grundrechte, Chapter 1). The problem with this notion is that political struggle cannot be escaped. It does not cease to exist simply because it is excluded from legal reasoning. Every legal decision involves political choices. If the methodology employed by international courts and tribunals does not reflect this, the result is not the absence of political struggle. Instead, this struggle is consistently decided in favour of the value or interest of which the pursuit seems self-evident in the given institutional context.

**Shifting the burden of justification**

The perpetuation of structural bias is related to another danger inherent in the employment of proportionality balancing as a tool for cross-regime harmonization. It consists in a shift in the burden of justification in international legal discourse. This danger is especially relevant in relation to human rights. Human rights are not guaranteed in absolute terms. Therefore, their main value lies in the fact that any encroachment on a right has to be justified. If specialized institutions outside human rights regimes, such as the WTO Appellate Body or investor-state arbitral tribunals, 'take into account' (Art. 31(3)(c) VCLT) human rights by way of proportionality balancing, human rights are introduced into these other regimes merely as

(potential) justifications for limitations on free trade or investor protection. Given that both the world trade and investment protection regimes are endowed with significantly more powerful institutions than human rights regimes (at least on the global level), such a shift in the burden of justification could shape the human rights discourse in general – to the detriment of the force of human rights norms as reference points in global discourse (this point has been further elaborated by Robert Howse).

**Conclusion**

Proportionality balancing as it is currently understood is not an appropriate method for responding to the fragmentation of international law. However, proportionality balancing could be both conceived and employed in a different way to avoid the problems described above. To avoid deformalization, proportionality balancing should be employed restrictively. Only norms that already have an element of weight and that are commensurable to a minimum degree should be weighed against each other using proportionality balancing. Additionally, proportionality balancing should always be employed in combination with another argumentative framework. This enables a transparent discussion of the questions excluded from proportionality balancing. Such questions include those regarding the meaning of the norms being weighed against each other and those regarding the parameters determining the balancing process in assessing proportionality *stricto sensu*. The assessment of "necessity" should accommodate alternative definitions. It should not be reduced to the search for a Pareto optimal solution. If a method of proportionality balancing with these characteristics can be developed, proportionality balancing could indeed function

as an argumentative framework that furthers the rationality, the transparency, the predictability, and therefore the legitimacy of the legal decision-making process.

A response to this post by Johann Ruben Leiss can be found here.

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